United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 6, 2014

TO: Daniel L. Hubbel, Regional Director
Region 14

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: KMOV-TV
Case 14-CA-107342

512-5012-0100
512-5012-0125
530-6050-5825
530-6050-5875

This case was submitted for advice as to whether the Employer's social media policy, and its unilateral implementation by the Employer, violates the Act. We conclude that the Employer violated Section 8(a)(1) of the Act because certain provisions of its social media policy are unlawfully overbroad, including provisions addressing: (1) insulting, embarrassing, hurtful, abusive, offensive, or derogatory comments; (2) sharing pictures; and (3) defamatory or libelous comments. However, we conclude that the provisions in the Employer's social media policy and employee handbook addressing disclosure of confidential information are lawful. We further conclude that the Employer violated Section 8(a)(5) of the Act by unilaterally implementing the "Personal Activity" section of its social media policy, which applies to all employees. Finally, we conclude that, under *Peerless Publications*,[1] the Employer lawfully implemented the section of its social media policy -- requiring employees to maintain credibility with the public, to apply journalistic standards (including accuracy and avoiding appearances of political bias), and to not damage the Employer's reputation or standing as an impartial news source -- that only applies to employees who have work-related social media responsibilities.[2]

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[1] 283 NLRB 334 (1987).

[2] This case was also submitted for advice as to whether the remedy for the Employer's alleged unlawful implementation of the sections of its social media policy applicable to employees who have work-related social media responsibilities would include the reinstatement of an on-air anchor terminated for messages posted on his work-related social media account that reasonably could be seen as damaging his credibility. As we have concluded that the relevant sections of the Employer's social media policy were implemented lawfully under *Peerless Publications*, and there is no

FACTS

KMOV-TV (the Employer) is owned by Belo Corp., which operates 20 television stations throughout the country. KMOV-TV reporters and on-air anchors maintain Facebook accounts through the Employer's Facebook page. The Employer encourages them to post stories and their thoughts on stories in order to engage the viewing public. The Employer further encourages employees to use Twitter usernames that identify the Employer in the name.

Screen Actors Guild-American Federation of Television and Radio Artists, Missouri Valley Local 77 (the Union) represents a bargaining unit comprised of "all persons employed as talent" by KMOV-TV, including reporters and on-air anchors. The current collective-bargaining agreement between the Employer and the Union will expire on December 31, 2013.[3] The agreement, which is silent as to granting the Employer the right to implement social media policies, includes the following management's rights clause:

> The Company shall have the exclusive right to select, manage and direct the working forces; this right shall include, but not be limited to, the right to plan, direct, and control the method or methods of transmission, telecast policy, and Station operation; to supervise the work of the artists; to hire, suspend or discharge under the terms of this Agreement; and to establish and enforce reasonable rules and regulations for the conduct of its artists.

In January, the Employer unilaterally implemented a new social media policy. This policy contains rules for conduct on the internet and threatens disciplinary actions, "up to and including termination," for violations. Management met with employees to go over the new policy but did not provide any notice to the Union or offer to bargain about the social media policy.[4]

The Employer's social media policy is divided into two sections. The first section applies to all employees, regardless of their work responsibilities. This section, entitled "Personal Activity," includes the following provisions relating to

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allegation that the Employer relied on any of the unlawful sections of its social media policy in the termination, we need not address this remedial issue.

[3] All dates herein are in 2013, unless otherwise noted.

[4] The policy appears to have been implemented for all of Belo Corp.'s employees, not just those working for the Employer.

social media conduct:

- Adhere to Belo's company harassment and retaliation policies. It is the responsibility of employees to notify management and/or Human Resources immediately of possible sexual or other unlawful harassment without the concern of reprisal or retaliation. Do not post insulting, embarrassing, hurtful or abusive comments about other company employees online. Do not share pictures of other Belo Employees unless the other employee is comfortable with it. Belo expects its employees to treat their co-workers with respect and courtesy at all times.

- Avoid the use of offensive, derogatory, or prejudicial comments.

- Do not defame Belo companies, their employees, clients, customers, audience, business partners or competitors. Indeed you should avoid making defamatory or libelous comments and postings in general as others may attempt to impute these comments to your employer or you as an employee.

- Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors, or customers.

The second section of the policy applies only to employees who have work-related social media responsibilities, "including anchors, reporters, producers, and management bloggers." This section includes the following provisions relating to social media conduct:

- You should do nothing that could undermine your credibility with the public, damage Belo's standing as an impartial source of news and information, or otherwise jeopardize the organization's reputation.

- When publishing or otherwise transmitting information online, apply the same journalistic standards you would in a more formal publication, including accuracy and the avoidance of an appearance of bias. With respect to the latter, do not put political affiliations or make political statements on your work profile. The same principles of thoroughness, common sense, and respect for our audience and subjects should prevail in social media as they do in traditional broadcasting or publishing.

- Particular care should be taken in responding to posts critical of our news coverage.

- With respect to Facebook or sites like it where a user has "friends" that are seen by others, use judgment in accepting "friendships" from political candidates, story subjects, public figures, causes, organizations, or businesses as doing so may create a perception that you or your employer are their friends or advocates.

The Employer also maintains an employee handbook. The "Employee Conduct and Work Rules" section of the handbook prohibits the "[u]nauthorized disclosure of business 'secrets' or other confidential information."

On June 17, the Union filed the charge in the instant case, alleging, *inter alia*, that the Employer's social media policy violates 8(a)(1) of the Act because it is overbroad, and that the Employer's social media policy violates 8(a)(5) of the Act because it was implemented unilaterally.

ACTION

We conclude that the Employer violated Section 8(a)(1) of the Act because certain provisions of its social media policy are unlawfully overbroad, including provisions addressing: (1) insulting, embarrassing, hurtful, abusive, offensive, or derogatory comments; (2) sharing pictures; and (3) defamatory or libelous comments. However, we conclude that the provisions in the Employer's social media policy and employee handbook addressing disclosure of confidential information are lawful. We further conclude that the Employer violated Section 8(a)(5) of the Act by unilaterally implementing the "Personal Activity" section of its social media policy, which applies to all employees. Finally, we conclude that, under *Peerless Publications*, the Employer lawfully implemented the section of its social media policy -- requiring employees to maintain credibility with the public, to apply journalistic standards (including accuracy and avoiding appearances of political bias), and to not damage the Employer's reputation or standing as an impartial news source -- that only applies to employees who have work-related social media responsibilities.[5]

[5] The Employer argues that the instant case should be deferred to the parties' grievance arbitration system under *Dubo Manufacturing Corp.*, as the Union filed a grievance addressing the Employer's unilateral implementation of its social media policy and an employee's termination that the Union asserts was based, at least in part, on the policy. We note, however, that the Union's grievance does not address the allegation that the Employer's social media policy is unlawfully overbroad under the Act. It is well established that, while the Board will defer charges to arbitration when the underlying issues are cognizable under the grievance-arbitration provisions of the parties' collective-bargaining agreement, where an allegation is inextricably related to other allegations that are not properly deferred, the Board will not defer any of the related issues. See, e.g., *George Koch Sons, Inc.*, 199 NLRB 166, 168 (1972); *Clarkson Industries*, 312 NLRB 349, 352 (1993) (declining to defer because

I. The Employer violated Section 8(a)(1) of the Act because certain provisions of its social media policy are unlawfully overbroad.

It is well established that an employer violates Section 8(a)(1) of the Act by maintaining a rule or policy that would "reasonably tend to chill employees in the exercise of their Section 7 rights."[6] The Board has developed a two-step inquiry to determine if an employer rule or policy would have such an effect.[7] First, a rule is unlawful if it explicitly restricts Section 7 activities. Second, if the rule does not explicitly restrict protected activities, it will violate the Act if: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.[8] In determining how an employee would reasonably construe the rule, particular phrases should not be read in isolation, but, rather, considered in context.[9]

In the instant case, the Employer's social media policy does not explicitly prohibit Section 7 activity. We conclude, however, that certain provisions of the policy applicable to all employees are nonetheless unlawful under *Lutheran Heritage*, as they would reasonably be construed to apply to activity protected by Section 7 of the Act.

Initially, we agree with the Region that the Employer's social media policy is unlawfully overbroad insofar as it prohibits posting "insulting, embarrassing, hurtful or abusive comments about other company employees online,"[10] and instructs

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"[t]he Board has consistently held that it will not defer one issue if it is closely related to another issue that is not deferrable"); *American Commercial Lines*, 291 NLRB 1066, 1069 (1988) (declining to defer because the charges were "an integral part of the Respondents' overall pattern of unfair labor practices and are so closely intertwined with the other complaint allegations"), overruled on other grounds by *J.E. Brown Electric*, 315 NLRB 620 (1994). Therefore, we agree with the Region that deferral of the instant matter would not be appropriate.

[6] *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

[7] *Lutheran Heritage Village–Livonia*, 343 NLRB 646, 647 (2004).

[8] *Ibid*.

[9] *Id*. at 646.

[10] See, e.g., *Thompson Reuters*, Case 02-CA-39682, Advice Memorandum dated April 5, 2011, at 25 (unlawful rules prohibiting communications that "attack or insult" the

employees to "[a]void the use of offensive, derogatory, or prejudicial comments."[11] These are broad terms that would commonly apply to protected criticism of the Employer's labor policies or treatment of employees. Nothing defines these broad terms or limits them in any way that would exclude Section 7 activity. In contrast, cases holding rules could not reasonably be construed to cover protected activity involved rules that clarified their scope by including examples of clearly illegal or unprotected conduct.[12] Here, there is no such limitation to the broad scope of this language, and we agree with the Region that this language violates Section 8(a)(1) of the Act.[13]

Employer, are "embarrassing to others," or "disparaging"); *Univ. Med. Ctr.*, 355 NLRB 1318, 1320-21 (2001), enf. denied in rel. part 335 F.3d 1079 (D.C. Cir. 2003) (unlawful rule against "disrespectful conduct"); *Claremont Resort and Spa*, 344 NLRB 832, 832 (2005) (unlawful rule prohibiting "negative conversations" about managers); *Cincinnati Suburban Press*, 289 NLRB 966, 966 n. 2, 975 (1988) (unlawful rules against "false, vicious, or malicious" statements and "improper or unseeming" conduct); *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989), enfd. in rel. part 916 F.2d 932 (4th Cir. 1990) (unlawful rule against "derogatory attacks"); *American Medical Response*, Case 34-CA-12576, Advice Memorandum dated October 5, 2010, at 13-14 (unlawful rule against "disparaging comments" about superiors and co-workers).

[11] See, e.g., *NCR Corp.*, 313 NLRB 574, 577 (1993) (unlawful rule against bulletin board postings that contain "offensive language"); *UPMC Presbyterian Shadyside*, Case 06-CA-081896, Advice Memorandum dated December 18, 2012, at 13 (b) (7)(A) [redacted] *Southern Maryland Hospital*, 239 NLRB at 1222 (unlawful rule against "derogatory attacks").

[12] See, e.g., *Tradesmen Int'l*, 338 NLRB 460, 460-62 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity).

[13] We note that the terms "abusive" and "prejudicial" might not be unlawful in isolation or in other contexts. Here, however, when they are included along with the other overbroad terms discussed above, the entire phrasing would reasonably be read by employees as limiting their ability to make communications protected by Section 7. Thus, the terms would reasonably be read by employees as part of a general prohibition interfering with employees' right to engage in vigorous criticism of employer policies and practices, and these portions of the Employer's social media policy are also unlawfully overbroad.

Second, we agree with the Region that the social media policy's prohibition against "shar[ing] pictures of other Belo Employees unless the other employee is comfortable with it" is unlawful, as it would reasonably be interpreted by employees as precluding them from using social media to post pictures of fellow employees engaged in protected activities like strikes or pickets or of employees working without proper safety equipment or in hazardous conditions.[14] We have previously found requirements that employees get permission before posting photos of other employees to be unlawful.[15] Here, while there is no express requirement that employees get "permission" from other employees, doing so would be the only way to ensure that the other employee is "comfortable with it." Therefore, this rule is unlawfully overbroad.[16]

Third, we agree with the Region that that the Employer's social media policy is unlawfully overbroad insofar as it requires employees not to "defame Belo companies [or] their employees," and to "avoid making defamatory or libelous comments and postings in general." It is well established that restrictions on defamatory, harassing,

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[14] See, e.g., *Boch Honda*, Case 1-CA-083551, Advice Memorandum dated December 13, 2012, at 6-7 (b) (7)(A) [redacted]

[15] See, e.g., *The H Group, B.B.T. Inc.*, Case 14-CA-30313, Advice Memorandum dated October 13, 2011, at 8 (prohibition against posting "pictures taken at work or at work-related functions that include employees without the employee's permission" was unlawful); *McKesson Corporation*, Cases 06-CA-066504 and 06-CA-070189, Advice Memorandum dated March 1, 2012, at 8 (requirement that employees "get permission before reusing others' content or images" was unlawful); *General Motors*, Case 7-CA-53570, Advice Memorandum dated December 20, 2011, at 7, and *General Motors*, 2012 WL 1951391, Case 7-CA-53570, JD-27-12, slip op. at 6 (ALJD dated May 30, 2012) (prohibition against posting photos without obtaining the owner's permission and ensuring that the content can be legally shared was unlawful).

[16] We note that this case is properly distinguished from *Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 4-5 (2011), enfd. in pertinent part 715 F.3d 928 (D.C. Cir. 2013), in which the Board found lawful a rule prohibiting employees from taking photographs of hospital patients or property, in light of the "weighty" privacy interests of hospital patients and "significant" employer interest in preventing wrongful disclosure of individually identifiable health information. Here, of course, the rule only addresses pictures of other employees, and no patient care issues or similar concerns would justify the rule's limits on employees' communications.

and libelous comments are overbroad, in the absence of any limiting context.[17] The Employer has not limited the scope of its restriction on defamation or libelous comments. Thus, the rule would reasonably be construed by employees as prohibiting such protected activities as criticizing the Employer's policies, and is therefore unlawfully overbroad.[18] Therefore, as each of the above provisions would reasonably be read by employees to prohibit protected Section 7 activity, we conclude that they violate Section 8(a)(1) of the Act.[19]

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[17] See, e.g., *Lafayette Park Hotel*, 326 NLRB at 828 (unlawful rule against "[m]aking false, vicious, profane or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees"); *Southern Maryland Hospital*, 293 NLRB at 1222 (unlawful rule against "derogatory attacks"); *LaPorte Regional Health Systems, Inc.*, Case 25-CA-031843, Advice Memorandum dated December 6, 2011, at 9 (unlawful prohibition of "discriminatory, defamatory or harassing web entries about specific employees, work environment, or work related issues"); *Flagler Hospital*, Case 12-CA-027031, Advice Memorandum dated May 10, 2011, at 4 (unlawful rule prohibiting "[a]ny communication or post which constitutes embarrassment, harassment or defamation of the Hospital" or of "any employee, officer, board member, representative or staff member"); *Richmond District Neighborhood Center*, Case 20-CA-091748, Advice Memorandum dated April 24, 2013, at 19 (unlawful rule stating that employees "can be sued by other employees or any individual that views your social media posts as defamatory, harassing, libelous, or creating a hostile work environment").

[18] The Employer argues that its employees would understand this provision to be more limited, given that they work in broadcast journalism and therefore, presumably, have a nuanced understanding of defamation and libel. Even assuming that such a particularized understanding might privilege a similar rule in some circumstances despite the rule's overbreadth, the Employer's argument is unavailing here because this section of the Employer's social media policy applies to *all* employees, not just those with editorial functions and specialized expertise.

[19] We also conclude, however, that the policy's statement that "[i]t is the responsibility of employees to notify management and/or Human Resources immediately of possible sexual or other unlawful harassment" is not unlawful. A rule may be overbroad if it includes general references to harassment (see, e.g., *Flagler Hospital*, Case 12-CA-027031, Advice Memorandum dated May 10, 2011, at 4 [rule prohibiting "[a]ny communication or post which constitutes embarrassment, harassment or defamation of the Hospital" or of "any employee, officer, board member, representative or staff member"]; *LaPorte Regional Health Systems, Inc.*, Case 25-CA-031843, Advice Memorandum dated December 6, 2011, at 9 [rule prohibiting "discriminatory, defamatory or harassing web entries about specific employees, work environment, or work related issues"]). However, such rules will not

II. The provisions in the Employer's social media policy and employee handbook addressing disclosure of confidential information are lawful.

We further conclude that the provisions in the Employer's social media policy and employee handbook addressing disclosure of confidential information are lawful. As discussed above, the Board has made clear that the standard by which a rule, that does not explicitly restrict Section 7 activities, will be evaluated is whether employees would reasonably construe the rule to prohibit Section 7 activity. With regard to employer confidentiality rules, then, the dispositive issue is whether employees will reasonably read the rule, in context, as prohibiting them from sharing information regarding their terms and conditions of employment and/or those of their fellow employees. For example, in *Super K-Mart*, the Board found lawful a rule that stated "[c]ompany business and documents are confidential. Disclosure of such information is prohibited," because the Board concluded that "employees reasonably would understand from the language of the Respondent's confidentiality provision that it is designed to protect the Respondent's legitimate interest in maintaining the confidentiality of its private business information, not to prohibit discussion of wages or working conditions."[20] In *Flamingo-Hilton Laughlin*, on the other hand, the Board found unlawful a provision prohibiting employees from revealing "confidential

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be found unlawful where they would not reasonably be understood to restrict Section 7 activity (see, e.g., *Tradesman, supra*, 338 NLRB at 462 [rule found to be lawful**,** in part, because it was found on a list of 19 rules which prohibited, among other things, "such egregious conduct as sabotage and sexual or racial harassment"]). Here, the social media policy addresses only "*unlawful* harassment," which is not protected by Section 7 and, therefore, the provision would not reasonably be read to include Section 7 activity.

[20] 330 NLRB 263, 263 (1999). See also *Lafayette Park Hotel*, 326 NLRB at 826 (finding lawful a hotel's rule prohibiting employees from "[d]ivulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information," because employees would not reasonably read this rule as prohibiting discussion of wages and working conditions among employees or with a union, but instead as merely protecting the employer's "substantial and legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information"); *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1284 n.2, 1290-91 (2001), enfd, 334 F.3d 99 (D.C. Cir. 2003) (finding lawful a rule requiring employees to handle confidential or proprietary information about the employer or its clients acquired during their employment "in strict confidence" and not to discuss such information, because employees would not construe the rule to prohibit the discussion of wages and working conditions among themselves or with a union).

information regarding our customers, fellow employees, or Hotel business," because employees would reasonably interpret the phrase "confidential information regarding . . . fellow employees" to prohibit discussion of wages and other terms and conditions of employment.[21]

Here, we conclude that employees would not reasonably read the confidentiality provisions in the Employer's social media policy and employee handbook as covering information regarding employees' wages and benefits, in the absence of any indication in the provisions themselves, or in the rest of the social media policy and employee handbook, that the provisions deal with the disclosure of such information. Rather, as with the confidentiality provision in *Super K-Mart*, "employees reasonably would understand from the language of the [Employer's] confidentiality provision that it is designed to protect the [Employer's] legitimate interest in maintaining the confidentiality of its private business information, not to prohibit discussion of wages or working conditions."[22] Thus, the provision here does not mention employee records or personnel data, reference working conditions in any way, or include any other indication that it would apply to information regarding employees or their terms and conditions of employment. Rather, the provision prohibits only disclosure of "confidential financial data," which, when read in context, would not reasonably be read to mean employee wage and benefit information, particularly in light of the rest of the paragraph, which references "other company *proprietary* information" and "information regarding business partners, vendors, or customers." Therefore, as the

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[21] 330 NLRB 287, 288 n.3, 291-92 (1999). See also *Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 1–2 (2012) (finding unlawful a prohibition against disclosing "personnel information and documents," even though provision also listed examples of confidential information that the employer could legitimately restrict from disclosure, because the context failed to adequately limit the provision's "unlawfully broad sweep"); *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB No. 54, slip op. at 3 (2013) (finding unlawful a confidentiality provision prohibiting employees from disclosing employee records or other information about their coworkers' jobs, even though the provision also listed examples of confidential information that the employer could legitimately restrict from disclosure, because employees would reasonably interpret the rule as restricting Section 7 communications); *Cintas Corp.*, 344 NLRB 943, 943 (2005), enfd. 482 F.3d 463, 469-70 (D.C. Cir. 2007) (finding unlawful a rule prohibiting release of any information concerning "the company, its business plans, its [employees], new business efforts, customers, accounting and financial matters," because employees would reasonably interpret the rule to preclude discussion of wages and other terms and conditions of employment).

[22] 330 NLRB at 263.

Board held in *Super K-Mart*, we conclude that the provisions in the Employer's social media policy and employee handbook addressing disclosure of confidential information are lawful.

III. The Employer violated Section 8(a)(5) of the Act by unilaterally implementing the "Personal Activity" section of its social media policy, which applies to all employees.

We further conclude that the Employer violated Section 8(a)(5) by unilaterally implementing the sections of its social media policy that apply to all employees. It is undisputed that the Employer unilaterally implemented the social media policy without notice to, or bargaining with, the Union. The Board has long held that work rules that could be grounds for discipline are mandatory subjects of bargaining.[23] Thus, the social media policy was a mandatory subject of bargaining that the Employer was required to bargain over before implementation.

Contrary to the Employer's claim, the management rights clause contained in the parties' collective-bargaining agreement did not privilege the Employer to unilaterally implement the social media policy. The Board will interpret the parties' agreement to determine whether there has been a clear and unmistakable waiver of the union's right to bargain over a mandatory subject.[24] A waiver may be found if the contract either "expressly or by necessary implication" confers on management the right to unilaterally take the action in question.[25] Absent specific contractual language, however, an employer claiming a waiver must show that "the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter."[26] The factors to consider in determining whether or not an effective waiver exists are : (1) the wording of the proffered sections of the agreement at issue; (2) the parties' past practices; (3) the

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[23] *Southern Mail, Inc.*, 345 NLRB 644, 646 (2005) (Department of Transportation driver logs); *Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001) (sick leave policy that could subject employees to discipline); *Bath Iron Works Corp.*, 302 NLRB 898, 902 (1991) (alcohol and drug policies which "created entirely new grounds for discipline").

[24] *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-15 (2007).

[25] *Id*. at 812, n.19, citing *New York Mirror*, 151 NLRB 834, 839-840 (1965).

[26] *Trojan Yacht*, 319 NLRB 741, 742 (1995). See also *Amoco Chemical Co.*, 328 NLRB 1220, 1221-22 (citing *Georgia Power Co.*, 325 NLRB 420, 420-21 (1998)) enfd. mem. 176 F.3d 494 (11th Cir. 1999), cert. denied 528 U.S. 1061.

relevant bargaining history; and (4) any other provisions of the collective-bargaining agreement that may shed light on the parties' intent concerning bargaining over the change at issue.[27]

The Board has repeatedly held that a generally worded management rights clause does not constitute a clear and unmistakable waiver of statutory rights.[28] Here, the management rights clauses make no explicit reference to social media policies or any related specific issue, but merely include the phrases "establish and enforce reasonable rules and regulations" and "supervise the work of the artists." This general language is far too broad and vague to find that the Union clearly and unmistakably waived its right to bargain over the social media policy, in the absence of any other, more specific, provision supporting the Employer's unilateral conduct.

For this reason, the instant case is properly distinguished from the cases cited by the Employer in which the Board has found particular contractual provisions to provide clear and unmistakable authorization for the employers' unilateral actions. For example, in *Virginia Mason Hospital*, specific provisions in the parties' management rights clause allowing the employer to unilaterally "direct the nurses," "to determine the materials and equipment to be used," and "to implement improved operational methods and procedures" authorized the employer to require nurses to wear facemasks to prevent infection.[29] Similarly, in *Quebecor World Mt. Morris II LLC*, specific provisions in the parties' management rights clause giving the employer the "exclusive right" to "demote, suspend, discipline or discharge for cause," as well as the exclusive right to "establish and apply reasonable standards of performance and rules of conduct," "plainly authorize[d]" the employer's unilateral establishment and application of disciplinary procedures for work-performance issues, including the

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[27] See generally *American Diamond Tool*, 306 NLRB 570, 570 (1992); *Johnson-Bateman Co.*, 295 NLRB 180, 184-87 (1989).

[28] See, e.g., *Hi-Tech Cable Corp.*, 309 NLRB 3, 4 (1992) ("general" contractual right to make "reasonable rules and regulations" insufficient to constitute clear and unmistakable waiver), enfd. mem. 25 F.3d 1044 (5th Cir. 1994); *Johnson-Bateman*, 295 NLRB at 185 (contractual right to issue, enforce, and change company rules without reference to any specific subject matters is not "express, clear, unequivocal, and unmistakable" waiver). See also *The Bohemian Club*, 351 NLRB 1065, 1067 (2007) (right to modify "methods, means and procedures" constitutes "general language" insufficient to act as waiver, even if management rights clause survived contract expiration).

[29] 358 NLRB No. 64, slip op. at 6 (2012).

implementation of a performance improvement plan procedure.[30] And, in *Baptist Hospital of East Tennessee*, specific provisions in the parties' management rights clause giving the employer the right "to determine and change starting times, quitting times and shifts," and the rights to "assign" employees and to "change methods and means by which its operations are to be carried on," privileged the employer's change in the holiday-shift scheduling procedure as "simply an incident of the fundamental right to schedule employees and to establish the means by which the employer's operations were carried out."[31] Finally, in *Provena Saint Joseph's Medical Center*, specific provisions in the parties' management rights clause giving the employer the right to "change reporting practices and procedures and/or to introduce new or improved ones," "to make and enforce rules of conduct," and "to suspend, discipline, and discharge employees," gave the employer the right to prescribe attendance requirements and the consequences for failing to adhere to those requirements.[32] In contrast, in the instant case, the clause merely contains the general phrases "establish and enforce reasonable rules and regulations" and "supervise the work of the artists," with no specific, or even implied, grant of unilateral authority over the creation of a new social media policy. Thus, we agree with the Region that the wording of the management rights clause here was not a clear and unmistakable waiver of the Union's right to bargain over the social media policy.

Moreover, the remaining *Provena* factors also fail to establish a waiver. As to the parties' past practice, while the Employer may not have bargained over past changes to the employee handbook, the parties have bargained over other policies concerning employee conduct. Thus, the parties have negotiated about Employer policies, including those regarding drivers who violate certain rules and employee use of alcohol and drugs. In addition, the Employer implicitly acknowledged a bargaining obligation over changes to its leave policy by approaching the Union and giving notice of the proposed changes, which were then approved by the Union after a membership vote. In addition, as the Employer never had a social media policy prior to Jan. 2013, whether as a stand-alone policy or in the employee handbook, there is no past practice of the Union waiving its right to bargain over such a policy. Consequently, there is nothing in the bargaining history, or in any other provisions in the collective-bargaining agreement, that demonstrates that the Union waived the obligation to bargain over the social media policy. Therefore, we agree with the Region that the

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[30] 353 NLRB 1, 3 (2008).

[31] 351 NLRB 71, 71-72 (2007) (the "plain language" of the contract "could hardly be clearer").

[32] 350 NLRB at 815 (these provisions "explicitly authorized" the employer's changes).

Union did not waive its rights to bargain about the social media policy, and the Employer violated Section 8(a)(5) of the Act by implementing it unilaterally.

IV. The Employer lawfully implemented the section of its social media policy that only applies to employees who have work-related social media responsibilities.

Finally, we conclude that the Employer was privileged under *Peerless Publications* to unilaterally implement the provisions of its social media policy requiring employees who have work-related social media responsibilities to maintain their credibility with the public, not to damage the Employer's standing as an impartial news source or otherwise to jeopardize the organization's reputation, and to apply journalistic standards, be accurate, and avoid an appearance of bias, including by refraining from making political statements. In the "unique context" of the journalism industry,[33] the Board has recognized that employers have a legitimate business interest in adopting rules to protect their credibility and editorial integrity.[34] Such rules must "strike a balance" between the Employer's legitimate business interest and the invasion of employee rights.[35] To that end, even in the journalism industry, rules must be "narrowly tailored, unambiguous, and designate the category of employees to whom the rules are applicable."[36] If the employer rules at issue meet these standards, an employer may lawfully implement them unilaterally, even if such conduct would violate Section 8(a)(1) and (5) of the Act under other circumstances. As the Board stated in *Peerless Publications*, "in

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[33] *King Soopers, Inc.*, 340 NLRB 628, 629 (2003). We recognize that the specific circumstances of *Peerless Publications* and subsequent Board cases have involved print publications, and not television or radio broadcast entities. We agree with the Region, however, that there is no principled distinction that would indicate that the analysis of *Peerless Publications* should not equally apply to broadcast journalism, as long as the same balance is struck between the employer's legitimate business interest in maintaining editorial integrity and the resultant invasion of employee rights.

[34] See *ANG Newspapers*, 343 NLRB 564, 565 (2004) (citing *Newspaper Guild Local 10 (Peerless Publications) v. NLRB*, 636 F.2d 550, 560 (D.C. Cir. 1980)); *Cincinnati Suburban Press*, 289 NLRB at 966 n. 2.

[35] *ANG Newspapers*, 343 NLRB at 565.

[36] *Cincinnati Suburban Press*, 289 NLRB at 966 n. 2. Although these principles derive from the Section 8(a)(5) analysis in *Peerless Publications*, they are relevant to and inform an 8(a)(1) analysis as well. *ANG Newspapers*, 343 NLRB at 565 n. 5 (citing *Cincinnati Suburban Press*).

order to preserve [editorial integrity], a news publication is free to establish reasonable rules designed to prevent its employees from engaging in activity which would 'directly compromise their standing as responsible journalists and that of the publication for which they work as a medium of integrity,' without necessarily being required to bargain initially."[37]

Thus, in *ANG Newspapers*, the Board found that a newspaper employer lawfully admonished one of its business reporters for appearing before a city council he ultimately covered as a reporter and asking the council to pass a resolution in support of the reporter's union, because the newspaper employer was legitimately concerned about the appearance of a conflict of interest. Analyzing the conversation at issue under *Peerless Publications*, the Board noted that maintaining the credibility and integrity of its newspaper was one of the employer's core purposes, and that the employer legitimately considered the reporter's conduct contrary to this core purpose and inappropriate. The Board found that the employer's response was narrowly tailored, was neither vague nor ambiguous, was directed only at the particular conflict of interest presented by the reporter's city council appearance, and was "appropriately limited in its applicability to affected employees to accomplish the necessarily limited objectives."[38]

Similarly, here, we conclude that the *Peerless Publications* standard is met by the sections of the Employer's social media policy applicable only to employees who have work-related social media responsibilities.[39] Such employees are expected to maintain their credibility with the public, and not to damage the Employer's standing as an impartial news source or otherwise to jeopardize the organization's reputation. Thus, they must take "particular care" in responding to posts critical of the Employer's news coverage, and apply journalistic standards, be accurate, and avoid an appearance of bias, including by refraining from making political statements and "using judgment" in accepting public "friendships." These requirements are narrowly tailored to the Employer's legitimate interest in

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[37] 283 NLRB at 335.

[38] 343 NLRB at 566.

[39] Given the standard set forth in *Peerless Publications*, however, we agree with Region that the Employer was not privileged under that case to implement the overbroad "Personal Activity" section of its social media policy, discussed above. That section is not narrowly tailored to the Employer's journalistic function, but instead applies generally to all employees' personal use of social media, is so broadly worded as to be inherently ambiguous, and covers all employees, not just the Employer's reporters and other editorial employees.

maintaining its editorial credibility, clearly and unambiguously set forth reasonable reportorial requirements, and apply solely to reporters and other editorial employees. While we recognize that a small number of non-editorial employees also have work-related social media responsibilities (e.g., sales personnel), the relevant sections of the policy -- including such admonitions as "apply the same journalistic standards you would in a more formal publication" and "[t]he same principles of thoroughness, common sense, and respect for our audience and subjects should prevail in social media as they do in traditional broadcasting or publishing" -- can only reasonably be read as limited to editorial personnel.[40] In this context, the Employer could legitimately determine that these sections of its social media policy are central to its core purpose of editorial integrity; they are designed to ensure that editorial employees exercise good judgment in communications with viewers in order to protect their journalistic credibility and reputation, as well as that of the Employer.[41] Therefore, we conclude that the Employer was privileged under *Peerless Publications* to unilaterally implement these sections of its social media policy.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) of the Act because certain provisions of its social media policy are unlawfully overbroad, specifically the provisions addressing: (1) insulting, embarrassing, hurtful, abusive, offensive, or derogatory comments; (2) sharing pictures; and (3) defamatory or libelous comments. The complaint should also allege that the Employer violated Section 8(a)(5) by unilaterally implementing the "Personal Activity" section of its social media policy, which applies to all employees. The Region should dismiss the remaining allegations, absent withdrawal, for the reasons set forth above.

/s/
B.J.K.

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[40] Of course, if the Employer were to apply these sections of its policy to non-editorial employees, the principles of *Peerless Publications* would not privilege such conduct.

[41] While the admonition to employees that they "should do nothing that could . . . otherwise jeopardize the organization's reputation" would certainly be unlawfully overbroad in other contexts, it is not in this section that applies solely to employees with work-related media accounts, because it appears in a sentence specifically addressing the journalists' "credibility with the public" and the Employer's "standing as an impartial source of news and information."